

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 22, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP1160-CR

Cir. Ct. No. 2011CF376

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CAS A. MARTIN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Rock County: JAMES P. DALEY, Judge. *Affirmed.*

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Cas Martin appeals a judgment convicting him of two counts of armed robbery as a party to a crime and an order denying postconviction relief. Martin argues he is entitled to resentencing because he was sentenced based on inaccurate information. We conclude Martin has failed to

show that the sentencing court actually relied on inaccurate information. We therefore affirm.

BACKGROUND

¶2 A criminal complaint charged Martin with two counts of armed robbery as a party to a crime, one count of attempted armed robbery as a party to a crime, and one count of obstructing an officer. The complaint alleged all four crimes occurred in Beloit between February 1 and 8, 2011. The armed robbery and attempted armed robbery charges involved the same scheme. At Martin's direction, a woman in DePere posted ads on Craig's List offering iPhones for sale. Martin and an accomplice then met with prospective buyers on three occasions and robbed or attempted to rob them at gunpoint. Martin's cousin, Tremaine Hill, admitted to being Martin's accomplice in one of the armed robberies. Hill told police the robbery was Martin's idea and the phone number used to contact two of the victims belonged to Martin.

¶3 Pursuant to a plea agreement, Martin pled guilty to the two armed robbery charges. The attempted armed robbery charge and the obstruction charge were dismissed and read in at sentencing. The State agreed to cap its sentence recommendation at seven years' initial confinement and ten years' extended supervision.

¶4 At sentencing, the State argued the primary factor the court should consider when imposing sentence was "the violence that occurred in these cases." The State stressed that Martin was the mastermind behind the robberies and had a pending charge in Milwaukee County in connection with a similar robbery. The State further observed the COMPAS Evaluation attached to the presentence investigation report indicated Martin had a high risk of reoffending. The State

also argued Martin “only partially admits his involvement, which indicates he’s not accepting responsibility.” Finally, the State emphasized that the robberies had caused the victims significant emotional distress. For these reasons, the State asked the court to impose sentences totaling seven years’ initial confinement and ten years’ extended supervision.

¶5 The defense’s sentencing argument emphasized that Hill, Martin’s accomplice in one of the armed robberies, had already been sentenced to seven years’ initial confinement and five years’ extended supervision in connection with that crime. Because Martin and Hill were parties to the same armed robbery, Martin’s attorney argued they should “be treated the same with regard to liability, but not with regard to sentencing[.]” Counsel noted that, although Martin had “one juvenile adjudication for theft and one adult conviction for [operating a motor vehicle without the owner’s consent],” Hill had “been to Lincoln Hills as a juvenile and Wisconsin School for Boys at Wales” and “had adult convictions for disorderly conduct, misdemeanor theft, battery by a prisoner, one battery by a prisoner read in, one armed robbery conviction, one armed robbery read in, and another misdemeanor theft read in.” Because Martin and Hill were “equally culpable,” but Hill had a “worse criminal history,” counsel argued Martin’s sentence should be shorter than Hill’s.

¶6 Defense counsel therefore recommended the court sentence Martin to four years’ initial confinement and seven years’ extended supervision. As further support for this recommendation, counsel noted Martin was only nineteen when the offenses were committed and he “admitted using cocaine and heroin during this crime spree.” Counsel argued rehabilitation should be one of the main goals of Martin’s sentence, and a lengthy term of confinement was not necessary to achieve that objective.

¶7 After the defense completed its sentencing argument, the following exchange took place between the court, defense counsel, and the State:

THE COURT: Where is the parity between the two in your argument?

[DEFENSE COUNSEL]: Excuse me, your Honor?

THE COURT: You say—You argued that, in fact, they should be jointly culpable and should get essentially the same sentence.

[DEFENSE COUNSEL]: Well, what I'm saying is the conduct was culpable. They did the same thing. But prior to that, and even after, Mr. Hill's record is a lot worse than my client[']s, and if the conduct is the same—

THE COURT: But he didn't have a felony as an adult, Hill. He had misdemeanors is what you have reported to me.

[DEFENSE COUNSEL]: He had misdemeanors as an adult but I think felonies as a juvenile because he was at Wales or Lincoln Hills.

THE COURT: That has nothing to do with felonies.

[DEFENSE COUNSEL]: You're right, your Honor.

THE COURT: All right.

[THE STATE]: Your Honor, I think just to clarify, confirming with Mr. Junig, who represented Mr. Hill, Mr. Hill was charged with two armed robberies, not three, didn't have one pending in Milwaukee County and pled to one of the two that he was charged with, so there was a little bit of a difference between them.

THE COURT: All right.

¶8 The court ultimately sentenced Martin to seven years' initial confinement and five years' extended supervision on one of the armed robbery counts. On the other count, the court withheld sentence and imposed five years' probation, consecutive to Martin's sentence on the first count. Explaining its

sentencing rationale, the court noted it could have sentenced Martin to forty years' imprisonment on each count. The court then stated the primary objectives of Martin's sentence were rehabilitation, specific deterrence, and punishment. The court explained:

I want to build in the sentence which encourages you, don't do it again. I don't think anything else is going to change your opinion unless you decide between your ears that, in fact, you're not going to treat the other people within the community the way you've treated these three victims in this case.

The court concluded by stating Martin's drug use was "no excuse" for his criminal conduct, and Martin needed to learn that his behavior was unacceptable.

¶9 Represented by new counsel, Martin filed a postconviction motion for resentencing, alleging he was sentenced based on inaccurate information. Martin asserted the sentencing court's statement that Hill did not have an adult felony conviction was inaccurate because Hill's conviction for battery by a prisoner was a Class H felony. Martin further asserted the sentencing court's questions about Hill's record "show[ed] that parity of sentences for the two co-defendants was a paramount concern[.]" Martin argued the court's questions, combined with its decision to impose a sentence identical to Hill's on one of the armed robbery counts, demonstrated the court actually relied on the inaccurate information. Martin also argued the error was not harmless.

¶10 The court denied Martin's motion, following a hearing. The court stated it understood at the time of sentencing that Hill's criminal record was "worse" than Martin's. However, the court decided to impose the same sentence anyway because Martin was "the brains of the organization and planning this thing." Martin now appeals.

DISCUSSION

¶11 On appeal, Martin renews his argument that he was sentenced based on inaccurate information. In response, the State contends Martin forfeited his right to raise this argument because his trial attorney failed to correct the sentencing court when it stated Hill did not have an adult felony conviction. Generally, a party must object to an error to preserve the issue for appellate review. *Door Cnty. DHFS v. Scott S.*, 230 Wis. 2d 460, 466, 602 N.W.2d 167 (Ct. App. 1999). However, the forfeiture rule is a rule of judicial administration, and we have inherent authority to disregard a forfeiture and address the merits of an unpreserved issue. *Village of Trempealeau v. Mikrut*, 2004 WI 79, ¶17, 273 Wis. 2d 76, 681 N.W.2d 190. Here, even if Martin’s right to raise an inaccurate information claim was forfeited when his attorney failed to correct the sentencing court, we would nevertheless review Martin’s claim under the ineffective assistance of counsel rubric. See *State v. Carprue*, 2004 WI 111, ¶47, 274 Wis. 2d 656, 683 N.W.2d 31. We therefore exercise our discretion to address the merits of Martin’s inaccurate information claim.

¶12 A defendant has a due process right to be sentenced based on accurate information. *State v. Travis*, 2013 WI 38, ¶17, 347 Wis. 2d 142, 832 N.W.2d 491. Whether a defendant was denied this right is a question of law that we review independently. *Id.*, ¶20.

¶13 To establish that he or she was sentenced based on inaccurate information, a defendant must first show there was inaccurate information before the sentencing court. *Id.*, ¶¶21-22. If the defendant makes this showing, he or she must then establish by clear and convincing evidence that the sentencing court actually relied on the inaccurate information. *Id.*, ¶22. The test for actual reliance

is whether the court gave “explicit attention” or “specific consideration” to the inaccurate information, so that it “formed part of the basis for the sentence.” *Id.*, ¶28 (quoting *State v. Tiepelman*, 2006 WI 66, ¶14, 291 Wis. 2d 179, 717 N.W.2d 1). If the defendant shows actual reliance on inaccurate information, the burden shifts to the State to prove the error was harmless. *Id.*, ¶23.

¶14 The State does not dispute Martin’s assertion that there was inaccurate information before the sentencing court—namely, the court’s belief that Hill did not have an adult felony conviction. Instead, the State argues Martin has not shown by clear and convincing evidence that the court actually relied on the inaccurate information. We agree.

¶15 The sentencing court referred to Hill’s criminal record only once, before imposing sentence, during an attempt to clarify defense counsel’s parity argument. The court never mentioned Hill during its sentencing remarks. A comparison of Martin’s and Hill’s criminal records played no part in the court’s explanation of its sentencing rationale. Instead, the court emphasized the significant maximum penalties Martin faced and the sentencing goals of rehabilitation, specific deterrence, and punishment. Protection of the public was also a concern, as the court stated it wanted to encourage Martin to “decide between your ears that, in fact, you’re not going to treat the other people within the community the way you’ve treated these three victims in this case.” The court rejected the argument that Martin’s drug use provided an excuse for his conduct, and it stressed that Martin needed to learn his behavior was unacceptable. The record does not show that the court gave “explicit attention” or “specific

consideration” to Hill’s criminal record, so that it “formed part of the basis for the sentence.” *Id.*, ¶28 (quoting *Tiepelman*, 291 Wis. 2d 179, ¶14).¹

¶16 Consequently, Martin has not shown by clear and convincing evidence that the sentencing court actually relied on inaccurate information. As a result, we need not address the State’s argument that, even if the court relied on inaccurate information, the error was harmless. *See Sweet v. Berge*, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983) (appellate court need not address every issue raised by the parties when one is dispositive).

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).

¹ We do not rely on the explanation for Martin’s sentence that the circuit court provided when denying Martin’s postconviction motion. Although the court stated during the postconviction hearing that it knew at the time of sentencing that Hill’s criminal record was worse than Martin’s, the transcript of the sentencing hearing clearly shows the court mistakenly believed Hill did not have an adult felony conviction. Further, while the court stated during the postconviction hearing that Martin’s sentence was based on his role as the mastermind of the robberies, the court did not express that rationale at sentencing. Martin asserts that, when a sentencing court’s after-the-fact comments during a postconviction hearing conflict with the court’s comments at sentencing, we may not rely on the court’s postconviction explanation for the sentence. *See State v. Anderson*, 222 Wis. 2d 403, 407-10, 588 N.W.2d 75 (Ct. App. 1998). The State does not respond to this argument. *See Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded).

